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No. 82-1623
IN THE

Supreme Court of the United States

October Term, 1982

IN RE BRANIFF AIRWAYS, INCORPORATED, *et al.*,

Debtors.

AMERICAN AIRLINES, INC.,

Petitioner,

vs.

BRANIFF AIRWAYS, INCORPORATED, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

REPLY BRIEF OF PETITIONER, AMERICAN AIRLINES, INC.

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REPLY BRIEF OF PETITIONER, AMERICAN AIRLINES, INC.

I.

THE COURT OF APPEALS HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, DECIDED BY THIS COURT.

Braniff Airways, Incorporated ("Braniff") argues in its Brief In Opposition (the "Braniff Brief") that the issues presented by this case are not important questions of federal law which should be decided by this Court. In support, Braniff argues that Courts of Appeals for the Fifth, Sixth and Eighth Circuits have each concluded that the district courts have bankruptcy jurisdiction under 28 U.S.C. §§ 1334 and 1471(a) and (b) and that the local rules promulgated in the wake of entry of the judgment in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 102 S.Ct. 2858 (1982) (collectively, the "local rules") are constitutional and valid. Braniff asserts that as a result of these three decisions, no uncertainty exists with respect to the constitutionality of the Local Rule of the Northern District of Texas Concerning Bankruptcy Cases and Proceedings (the "Local Rule") and the existence of district court jurisdiction over bankruptcy matters.

Braniff's argument overlooks the almost daily challenges to bankruptcy court jurisdiction, which challenges will continue to be brought until the questions presented in this case are resolved by this Court. Even now, notwithstanding three Courts of Appeals decisions to the contrary, courts continue to hold that no district court jurisdiction over bankruptcy matters exists and that the local rules are invalid. *See, e.g., In re Wildman*, No. 81-B-5869 (Bankr. N.D. Ill. May 6, 1983).[1] It is imperative that this Court definitively resolve the uncertainty as to the existence of district court

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[1] *In re Wildman* has been lodged with this Court contemporaneously herewith. The opinion is an excessively caustic attack on the local rules, the Judicial Conference of the United States, and the courts which have so far upheld the local rules. The vehemence of Bankruptcy Judge Merrick's attack on the local rules itself demonstrates the necessity of this Court resolving the constitutionality of the local rules.

bankruptcy jurisdiction and the constitutionality of the current system of administration of over 500,000 pending bankruptcy cases involving billions of dollars.[2]

II.

THE COURT OF APPEALS HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW IN A WAY THAT CONFLICTS WITH THIS COURT'S DECISION IN *MARATHON*.

A. The District Courts Have No Jurisdiction Under 28 U.S.C. §§ 1471(a) and (b).

Braniff argues that *Marathon* did not invalidate any grant of bankruptcy jurisdiction to the district courts because *Marathon* addressed only the jurisdictional grant to the bankruptcy courts under the Bankruptcy Reform Act of 1978 (the "Bankruptcy Reform Act"). Braniff emphasizes the lack of reference in the plurality and concurring opinions to the existence or non-existence of district court jurisdiction over bankruptcy matters. The reason for the total absence of discussion of district court jurisdiction in *Marathon* is the recognition by this Court that Sections 1471(a) and (b) of Title 28 of the United States Code (the "Judicial Code") only serve as the first step in a two-step process of vesting exclusive trial court jurisdiction in the bankruptcy court. The legislative history explains the reason for the adoption of this artificial two-step approach of vesting exclusive jurisdiction in the bankruptcy court:

> (1) The presently established U.S. District Courts can serve as Article III repositories for the broadened jurisdiction

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[2]The uncertainty of the validity of bankruptcy court orders under the local rules hampers the administration of bankruptcy cases in many respects. For example, purchasers of a bankrupt's assets cannot be assured of clear title, lenders to trustees and debtors-in-possession cannot be assured of lien priority and proponents of plans of reorganization cannot be confident that the confirmation of a plan is binding upon all parties. Each impediment tends to depress interest in and therefore the value to be preserved by the bankruptcy process. Moreover, at least one bankruptcy judge has been sued personally on the grounds that the judge deprived the plaintiff of property without due process of law because the judge had no power to act under the respective local rule. *Cameron v. Real*, No. 83-0187 (RG) (C.D. Cal.).

essential to efficient judicial administration of bankruptcy cases.

(2) The expanded jurisdiction vested in the U.S. District Courts may be delegated by statute for exercise exclusively by bankruptcy judges, subject always to review, as under present law, by the district courts. Certain perceived constitutional impediments to the exercise of the judicial power of the United States by non-tenured judges are thus eliminated.

(3) The dislocations associated with the continued evolution of the present referee system into a functionally independent adjunct of the district court are minimal in comparison to those attendant upon the establishment of separate bankruptcy court system.

(4) The fragmentation of the federal court jurisdiction envisioned by some is thus avoided.

(5) The convenience and economy of District Court appeals are preserved.

S.Rep. No. 989, 95th Cong., 2d Sess. 16 (1978).

This Court recognized that the apparent jurisdictional grant to the district courts contained in §§ 1471(a) and (b) was in fact part of a unitary and non-severable grant of jurisdiction to be exercised exclusively by the bankruptcy courts. This "facade of a grant to the district courts", *Marathon*, 102 S.Ct. at 2879, cannot now be artificially severed from § 1471(c) and transformed into something Congress manifestly never intended it to be under any circumstances: an independent grant of jurisdiction over bankruptcy cases and proceedings to the district courts.[3] Accordingly, Braniff's argument that *Marathon* did not strip the district courts of bankruptcy jurisdiction ignores the entire legislative history of the Bankruptcy Reform Act and ignores this Court's holding that the jurisdictional provisions of § 241(a) of the Bankruptcy Reform Act, enacting §§ 1471(a), (b), and (c)

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[3]*See Wildman*, slip op. at 37-39, 45-48, 70-71. The House Report accompanying the House Bill, H.R. 8200, identifies several reasons why Congress believed that vesting trial court jurisdiction in the existing district courts was an unacceptable alternative to creating a new bankruptcy court system. *See* H.R. Rep. No. 595, 95th Cong., 1st Sess. 14-15 (1977).

of the Judicial Code, constituted a unitary and non-severable grant of bankruptcy jurisdiction to one single court — the bankruptcy court.

B. The Local Rule Is Unconstitutional.

Braniff asserts that under the Local Rule the "essential attributes of judicial power" and the "ultimate decisionmaking authority" remain in the district court. Braniff's support for this assertion is a recitation of the provision of the Local Rule providing for *de novo* review by district court of the findings and conclusions of the bankruptcy judge. Braniff ignores the fact that in "core" proceedings under the Local Rule bankruptcy judges enter final orders and judgments which become enforceable upon entry, unless stayed pending appeal. It is difficult to conceive of a result which would be more in conflict with the *Marathon* decision.

Braniff argues that entry of final orders by bankruptcy judges in core proceedings is proper because core proceedings only involve the restructuring of debtor-creditor relations, which this Court in *Marathon* purportedly recognized as being the proper subject of adjudication by legislative courts. Braniff further argues that the Bankruptcy Court's consideration of the PSA agreement and related agreements involved only the restructuring of debtor-creditor relations. However, *Marathon* did not hold that all proceedings involving the restructuring of debtor-creditor relations could constitutionally be adjudicated by an Article I judge. The plurality in *Marathon* declared only that the core of bankruptcy power — the restructuring of debtor-creditor relations — *may* be a public right.[4] Although the plurality provided no further guidance on what part of the bankruptcy power may involve "public rights", the private and state-created rights at issue in the PSA Proceeding and the CAB Proceeding surely did not involve the adjudication of public rights only.

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[4]The plurality's discussion was in the narrow context of a discussion of whether a discharge in bankruptcy is a public right. 102 S.Ct. at 2871.

C. The Decision Below Ignores the Mandate of *Marathon* That Only Congress May Remedy the Present Jurisdictional Void.

The Court of Appeals and Braniff have ignored Justice Brennan's constitutionally mandated declaration that "it is for Congress to determine the proper manner of restructuring the Bankruptcy Act of 1978". 102 S.Ct. at 2880 n. 40. The courts below found that the potential disruption of the nation's bankruptcy system empowers the lower courts to step in notwithstanding the unequivocal declaration of this Court that it is improper for the judiciary to do so. Expediency can never justify any court ignoring the fundamental principle of separation of powers so often recognized by this Court.[5]

Justice Brennan in the plurality opinion noted:

> [W]e cannot conclude that if Congress were aware that the grant of jurisdiction could not constitutionally encompass this and similar claims, it would simply remove the jurisdiction of the bankruptcy court over these matters, leaving the jurisdictional provision and adjudicatory structures intact with respect to other types of claims and thus subject to Article III constitutional challenge on a claim-by-claim basis.

102 S.Ct. at 2880 n. 40.

Braniff argues that this Court should allow the lower courts to ignore the principle of separation of powers and to judicially legislate a new bankruptcy court system simply because Congress might prefer a temporary unconstitutional judicial remedy while

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[5]By leaving to Congress the exclusive responsibility for enacting a legislative solution to the jurisdictional void created by *Marathon*, this Court recognized that the judicial power of the United States is:

> Dependent for its distribution and organization, and for the modes of its exercise entirely upon the action of Congress, who possess the sole power of creating tribunals inferior to the Supreme Court . . . and of investing them with jurisdiction . . . in the exact degrees and character which to Congress may seem proper for the public good.

Palmore v. United States, 411 U.S. 389, 401 (1973). *See also Humphrey's Executor v. United States*, 295 U.S. 602, 629-30 (1935); *O'Donoghue v. United States*, 289 U.S. 516, 530 (1933).

it considers remedial legislation. Nothing, including a temporary disruption of the bankruptcy court system,[6] can justify usurpation of the exclusive authority of Congress to determine the manner of restructuring the jurisdictional provisions of the bankruptcy laws.

III.
THE DISTRICT COURT IS WITHOUT JURISDICTION OVER BANKRUPTCY CASES.

According to Braniff, Sections 1331, 1332 and 1334 of the Judicial Code currently grant to the district courts jurisdiction to hear "most bankruptcy and related matters." (Braniff Brief at 17). Braniff concedes that the jurisdiction created by these sections is not co-extensive with that granted under 28 U.S.C. §§ 1471(a) and (b). Thus, even if Braniff is correct that district court jurisdiction over bankruptcy matters subsists by virtue of these three sections, direction is needed from this Court in order to determine the boundaries of any continuing bankruptcy

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[6]Presumably Congress would promptly act to legislate a remedy to the existing jurisdictional void if this Court were to rule in favor of Petitioner herein. Moreover, the resulting legislation would be less likely to be of questionable constitutional validity than that currently being considered by Congress. Many of the infirmities contained in the Local Rule are replicated in S. 1013, which the Senate passed on April 27, 1983. 129 Cong. Rec. S 5384 (daily ed. April 27, 1983). *See* S.Rep. No. 55, 98th Cong., 1st Sess. 14, 42 (1983) (S. 1013 shares many similarities with the interim rule under which district courts and bankruptcy courts have been operating since entry of the *Marathon* judgment). The Senate Report accompanying S. 1013 states that the "*Marathon* decision is a confusing one to most observers" and that *Marathon's* "scope is a matter of widespread disagreement". *Id.* at 2, 8. Later the Senate Report states that the *Marathon* decision is subject to varying interpretations and that "the required legislative response to *Marathon* may be viewed in a widely disparate manner by different observers". *Id.* at 32. The Senate Report also shows that the Senate has relied on the decision below in its determination that S. 1013 is an appropriate and constitutional legislative remedy to the void created by *Marathon*. *See id.* at 2, 41. Given the cloud under which S. 1013 is being considered, it is a virtual certainty that, absent review of this case by this Court, should S. 1013 become law it will be subject to constitutional challenge. *See Wildman*, slip op. at 73.

jurisdiction.

Petitioner, contrary to the assertions of Braniff, does not claim that old § 1334 was not repealed and that this Court may repeal a statute where Congress has neglected to do so. Old Section 1334 was effectively repealed by virtue of Congress enacting: (i) Sections 238 and 405(c)(2) of the Bankruptcy Reform Act, which operate to render the district court an appellate court under new Section 1334 effective October 1, 1979; and (ii) Sections 241(a), 404(a) and 405(a)(1) which together vest trial court jurisdiction, effective October 1, 1979, solely in the bankruptcy court. There is not an iota of support in the legislative history of the Bankruptcy Reform Act for the anomalous proposition asserted by Braniff that Congress intended to leave old Section 1334 effective alongside the inherently inconsistent jurisdictional provisions presently effective under the Bankruptcy Reform Act.

In addition, Braniff claims that this Court has recognized that the federal bankruptcy laws may serve as a basis for federal question jurisdiction under § 1331 of the Judicial Code, which grants district courts original jurisdiction of "all civil actions arising under" the laws of the United States. No case cited by Braniff held that a district court has jurisdiction over a bankruptcy case as part of its federal question jurisdiction.[7]

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[7]*Lovell v. Newman*, 227 U.S. 412 (1913), rather than finding federal question jurisdiction included bankruptcy matters, held that no basis of jurisdiction existed over an action brought by a trustee in bankruptcy. *Hull v. Burr*, 234 U.S. 712 (1914), concerned a collateral attack of bankruptcy proceedings in which the plaintiff had insisted that the bankruptcy proceedings were void for want of jurisdiction. The Court there expressly stated that it had not considered whether the action had arisen under the laws of the United States. 234 U.S. at 720-21.

The language Braniff quotes from *National Mutual Insurance Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 611 (1949) (Rutledge, J., concurring) as support for its argument concerned the scope of the federal question clause of Article III, § 2, not the scope of 28 U.S.C. § 1331.

The two other cases relied upon by Braniff involve whether a college may refuse to release transcripts to students whose student's loans have been discharged in prior bankruptcy proceedings. In no sense did the actions involve bankruptcy matters or proceedings or otherwise arise in the context of an existing bankruptcy case. *See Girardier v. Webster College*, 563 F.2d 1267 (8th Cir. 1977); *Handsome v. Rutgers University*, 445 F.Supp. 1362 (D.N.J. 1974).

Braniff also points to the diversity of citizenship jurisdiction under Section 1332 as a third source of jurisdiction which, when combined with Sections 1331 and 1334 purportedly gives the district courts jurisdiction over "most" bankruptcy and related matters. The jurisdiction granted under Section 1332 is not co-extensive with the jurisdiction over civil proceedings "related to cases under Title 11" granted under Section 1471(b) since diversity of citizenship jurisdiction requires not only an amount in controversy exceeding $10,000.00, but also complete diversity between all plaintiffs and all defendants.[8]

IV.

THE DISTRICT COURT WAS WITHOUT AUTHORITY TO PROMULGATE THE LOCAL RULE OR ORDER THE SPECIFIC REFERENCE.

As authority for the promulgation of the Local Rule, Braniff cites 28 U.S.C. § 332(d)(1).[9] Neither the District Court nor the Court of Appeals relied upon the recommendation of the Fifth Circuit Judicial Council as a possible source of authority for the Local Rule. The power to make orders regarding the "expedition of the business of the courts in each circuit", *Chandler v. Judicial Council of the Tenth Circuit*, 398 U.S. 74, 108 (1970) (Harlan, J., concurring), cannot authorize a Judicial Council to judicially legislate a subsidiary court system to hear over 500,000 pending bankruptcy cases, each of which may involve numerous different civil proceedings. Similarly, the cases cited by Braniff involving Fed. R. Civ. P. 83 provide no authority for the sweeping automatic reference under the Local Rule.[10]

[8]No such complete diversity exists in the proceedings below; both Petitioner and Braniff have their principal place of business in Texas. *See* 28 U.S.C. § 1332(c).

[9]Section 332(d)(1) authorizes the Judicial Councils of each circuit to "make all necessary and appropriate orders for the effective and expeditious administration of justice within [the] circuit." 28 U.S.C. § 332(d)(1).

[10]In *Franquez v. United States*, 604 F.2d 1239 (9th Cir. 1979), the court held only that the granting of a trial by jury, a right which the district court had found that Congress intended to provide under the legislation governing the action, was not inconsistent with the authority granted the district court under a statute authorizing the use of special masters or judges in certain actions. *Kimbrough v. Holiday Inn*, 478 F.Supp. 566 (E.D. Pa. 1979) held only that a local rule which provided for compulsory, *non-binding* pre-trial arbitration was not a basic procedural innovation because the right to a jury trial was not violated.

Braniff contends that Fed. R. Civ. P. 53 does not govern references under the Local Rule, because of the existence of the Federal Magistrates Act, 28 U.S.C. §§ 631, *et seq.*, purportedly demonstrates that Rule 53 does not apply to all references. Obviously, the statutory authority granted under the Federal Magistrates Act to delegate certain limited adjudicatory functions to United States magistrates exists outside of and in addition to the authority granted under Rule 53. However, absent statutory authorization, courts may not refer judicial functions to referees without regard to the constraints of Rule 53.[11]

Similarly, Braniff argues that the inherent power of a district court recognized by this Court in *In re Peterson*, 253 U.S. 300 (1920) is unlimited in scope. The inherent power recognized in *Peterson* is a limited authority to delegate certain quasi-judicial pre-trial tasks of an advisory nature to an agent of the court, where such a delegation is not inconsistent with legislation. It does not give authority to a district court to delegate to an agent the authority to enter a final order or judgment effective upon entry unless stayed pending appeal to the district court.[12]

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[11]Braniff asserts that *Arthur Murray, Inc. v. Oliver*, 364 F.2d 28 (8th Cir. 1966) stands only for the proposition that where a master is appointed under Rule 53, it must adhere to the requirements of Rule 53. Braniff's construction of Rule 53 would permit district courts to ignore the "exceptional circumstances" requirement of Rule 53 since under Braniff's reasoning a court need only state that a particular reference is not under Rule 53 in order not to be subject to the constraints of Rule 53.

[12]In *Ruiz v. Estelle*, 679 F.2d 1115 (5th Cir. 1982), cited by Braniff, the district court appointed a person to assist it in administering a post-decretal remedy. *Ruiz* recognized only the power "of a federal court to appoint an agent to supervise the implementation of its decrees." 679 F.2d at 1161. Similarly, *Schwimmer v. United States*, 232 F.2d 855 (8th Cir.), *cert. denied*, 352 U.S. 833 (1956), also relied upon by Braniff, merely sanctioned the appointment of a "master" to conduct a proceeding upon a *subpoena duces tecum* to determine whether an attorney-client privilege attached to certain documents. The court there noted that the reference was an incident to the proceeding which was authorized only so long as no rights were prejudiced thereby and that, where the master's actions accomplished a judicial result, it had no legal validity absent subsequent confirmation by the district court. 232 F.2d at 865.

V.
CONCLUSION.

For the foregoing reasons, this Court should grant the Petition for Writ of Certiorari and should reverse the orders affirming the validity and constitutionality of the Local Rule.

Respectfully submitted,

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